UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

HERBERT G. BIRCH SERVICES, INC.
Employer

and Case No. 29-RC-10227

LOCAL 215, DISTRICT COUNCIL 1707,
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO
Petitioner[1]

DECISION AND DIRECTION OF ELECTION

Herbert G. Birch Services, Inc. ("the Employer") is engaged in providing residential social services to children and adults with developmental disabilities and mental retardation at various locations in New York. On June 14, 2004, Local 215, District Council 1707, American Federation of State, County and Municipal Employees, AFL-CIO ("the Petitioner") filed a petition under Section 9(c) of the National Labor Relations Act ("NLRA"), seeking to represent a unit of non-professional employees at six facilities in Brooklyn, New York. The Employer contends that the petition must be dismissed because of New York State labor law Section 211-a, enacted in 2002, which prohibits state-funded employers from using state funds in certain specified ways to encourage or discourage union organization among their employees. Specifically, the Employer contends that Section 211-a inhibits an employer's right under the NLRA to

[1] The Petitioner's name appears as corrected. The Employer's post-hearing motion to correct typographical errors in the transcript is hereby granted. (See Appendix A.)

express its views regarding union organization, that the state law is preempted by the NLRA, and that this Agency's failure to seek an injunction to prevent the state's enforcement of Section 211-a constitutes objectionable conduct which prevents a free and fair election from being held. A hearing was held before Joanna Piepgrass, a hearing officer of the National Labor Relations Board.

For reasons described in more detail below, I deny the Employer's motion to dismiss the petition, and order an election in the appropriate unit below.

Background

The facts, derived from Employer Exhibit 1(a) through (f) (abbreviated as "Er. Ex. #") and the record in Independence Residences, Inc., JD (NY)-25-04 (June 7, 2004), Case No. 29-RC-10030, are not in dispute. The legal issue raised herein is whether this Agency should continue to run representation elections at a time when, the Employer claims, a state law interferes with its ability to campaign against representation, and when litigation challenging the state law on preemption grounds is pending.

The United States Supreme Court has held that national labor policy, as expressed by Congress in the NLRA, preempts any state laws regulating activity which is arguably protected or prohibited by the NLRA. Building Trades Council (San Diego) v. Garmon, 359 U.S. 236 (1959). With respect to that activity, the Board has primary jurisdiction. Furthermore, the Supreme Court has found that Congress deliberately sought to leave a "no man's land" of activity, such as economic weapons that are neither protected nor prohibited by the NLRA, to be free from state-law regulation and interference. Machinists Lodge 76 v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976). Nevertheless, there are exceptions to the preemption doctrine. For

example, when a state acts as a "market participant" to protect its "proprietary" interest regarding a narrow spending decision -- not as a regulator of general applicability attempting to shape the overall labor market -- the state's spending decision is not preempted. Building & Construction Trades Council (Metro. Dist.) v. Associated Builders & Contractors of Mass./R.I., 507 U.S. 218 (1993)(state agency, acting as a market participant in the Boston Harbor cleanup project, allowed to require all private contractors to abide by a project labor agreement).

New York Labor Law Section 211-a, enacted in 2002, prohibits employers from using state funds to (a) train managers and supervisors to encourage or discourage union organization, (b) hire attorneys, consultants or other contractors to encourage or discourage union organization, or (c) hire or pay employees whose principal job duties are to encourage or discourage union organization (Er. Ex. 1(b)). The statute also provides, *inter alia*, that the Commissioner of Labor shall promulgate regulations requiring employers to maintain financial records sufficient to show that state funds were not used to pay for such activities. On October 30, 2002, the NLRB Assistant General Counsel for Special Litigation wrote a letter to the New York Commissioner of Labor, expressing concern that Section 211-a may be preempted by the NLRA, and asking for certain information (Er. Ex. 1(c)). On January 30, 2003, officials from the state Attorney General's Labor Bureau and the state Department of Labor sent a response, generally defending the validity of Section 211-a (Er. Ex. 1(d)). The state's letter also noted that the implementing regulations had not yet been promulgated.

In the meantime, a group of healthcare and social service associations in New York (herein collectively called "the Associations") wrote a letter to NLRB General

Counsel Arthur Rosenfeld and the Special Litigation Branch in December 2002, asking the Agency to seek an injunction under NLRB v. Nash-Finch Co., 404 U.S. 138 (1971), to prevent the enforcement of Section 211-a, or to intervene in actions that the Associations intended to bring in federal court (Er. Ex. 1(a)). The record contains no response from the Agency.

In April 2003, the Associations did in fact file a lawsuit in federal district court, seeking a declaration that Section 211-a is invalid for a number of reasons, including preemption. *See* Independence Residences, *supra*, slip op. at p.7, referring to Healthcare Association of New York et al. v. Pataki et al., Case No. 3-CV-413. It does not appear that the Board or the General Counsel filed any briefs or took any official position in that litigation, which appears to be still pending. Id.

There is no evidence that the New York Commissioner of Labor has promulgated the implementing regulations authorized by Section 211-a, or that New York State has initiated any investigations or actions under Section 211-a at the present time.

In the meantime, similar "neutrality" legislation enacted in California provoked similar litigation in that state. Specifically, in 2000, California enacted a statute forbidding employers who receive state funds in excess of $10,000 from using such funds to advocate against or in favor of union organizing. In April 2002, the Chamber of Commerce and other groups brought an action for injunctive and declaratory relief,

challenging the statute on numerous grounds, including preemption.[2] Two years later, in April 2004, the Ninth Circuit Court of Appeals affirmed the federal district court's finding that the California statute was preempted by the NLRA and enjoined the state from enforcing the statute. Chamber of Commerce et al. v. Lockyer et al., 364 F.3d 1154 (2004).

The Employer herein contends that the petition must be dismissed because Section 211-a inhibits an employer's right under the NLRA to express its views regarding union organization, that the state law is preempted by the NLRA, and that this Agency's failure to seek an injunction to prevent the state's enforcement of Section 211-a, or to intervene in the Associations' pending lawsuit, constitutes objectionable conduct which prevents a free and fair election from being held. The Petitioner opposes the motion to dismiss, arguing *inter alia* that the Employer may express its views using funds it has from non-public sources.

Discussion

In my view, a Regional Director of the National Labor Relations Board does not have the authority to decide the validity of state laws. Thus, the issue at this stage of the case is not whether the NLRA pre-empts New York labor law Section 211-a but, rather, what to do with an election petition filed in the State of New York while litigation challenging the validity of Section 211-a is pending.

In this regard, it is instructive to consider two representation cases which the Agency continued to process while the above-described preemption litigation was pending.

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2 The Board voted to authorize the General Counsel to file a brief in that case, arguing that the

ATC/Vancom of California, L.P., 338 NLRB No. 180 (2003), was a consolidated case in California involving alleged unfair labor practices and objections to a decertification election. The employer's bus operators were represented by a Teamsters local, and the relevant collective bargaining agreement gave the Teamsters access to a bulletin board at the employer's bus yard. After an employee filed a decertification petition on November 30, 2000, and a rival union intervened (United Transportation Union or UTU), the employer started removing Teamsters notices from the bulletin board. The employer claimed that under the California "neutrality" law, it could not favor one union or another. After the Teamsters lost the election to UTU, it filed unfair labor practice charges alleging *inter alia* that the employer unilaterally changed its contractual bulletin board access in violation of Section 8(a)(5), and filed a corresponding objection to the election. The Board rejected the employer's defense -- that it was bound by the California "neutrality" law to remove the notices -- noting specifically that the statute had not yet gone into effect. 338 NLRB No. 180 at fn.2. (The events during the critical period in December 2000 immediately preceded the statute's effective date of January 1, 2001.) The Board ordered the employer to restore the Teamsters' access to the bulletin board, and ordered the Regional Director to hold a new election. *It should be noted that the Board did not decline to order a second election, even though the California statute had gone into effect by the time of the Board's decision, and even though the preemption litigation was still pending in the Ninth Circuit at that time.* Nevertheless, the Board went on to remark: "If, in the future, the Respondent is sued under the above [California neutrality] statute, based on its

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California law was preempted by the NLRA.

actions in compliance with this Order, it may seek reconsideration of this Order." Id. The Seventh Circuit Court of Appeals recently upheld the Board's decision in that case, noting that the employer's concern about possible future prosecution under the California statute was "speculative," and that the Board acted reasonably in deferring consideration of the preemption issue at that time. ATC Vancom of California, L.P. v. NLRB, 370 F.3d 692, 697 (June 3, 2004).

In Independent Residences, *supra*, this Region denied an employer's request to stay the representation proceedings pending the outcome of the litigation involving New York labor law Section 211-a. The Board then denied the employer's request for review of the Region's action, although it noted that the employer "may seek to raise, in any post-election proceedings, questions regarding the impact, if any" of the New York statute. JD(NY)-25-04, slip op. at p.2. In the ensuing post-election proceeding, Administrative Law Judge Steven Fish found that, even though it is "highly likely" that the Board will consider Section 211-a to be preempted, the evidence failed to show that the existence of Section 211-a interfered with the employees' free choice in the election in that case.

These cases suggest that the Board has no intention of dismissing all representation petitions, or staying all representation proceedings, simply because state "neutrality" laws exist which may or may not be preempted by the NLRA. To do so would deprive thousands of employees who work in those states, whose employers receive state funding, of important rights protected by the NLRA. Furthermore, such action would be based on speculation. First, since Section 211-a's implementing regulations may not yet have been promulgated, any purported concern regarding

potential state enforcement actions may be premature and speculative. ATC/Vancom of California, L.P. v. NLRB, *supra*. Second, the outcome of the Associations' pending litigation is unknown. The federal court may find, for example, that Section 211-a falls under the "market participant" doctrine or some other exception. This Agency cannot stay all election proceedings during years of litigation, on the chance that Section 211-a *might* be found preempted. Furthermore, even if one assumes that the statute is likely to be struck down (as Judge Fish assumed without deciding in Independence Residences), one cannot predict with certainty that its existence will interfere with employees' free choice in particular elections. In other words, the Agency will not deprive employees of elections, because a state law *might* have an objectionable effect on a particular employer's campaign. As the Board has indicated, these issues might be better addressed in a post-election proceeding (as in Independence Residences) or a motion for reconsideration (as in ATC Vancom) at the appropriate time.

Accordingly, based on the foregoing, I deny the Employer's motion to dismiss the petition, and order an election in the appropriate unit described below.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, including the parties' stipulations and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Herbert G. Birch Services, Inc., is a domestic corporation with its principal office and place of business located at 275 Seventh Avenue, New York, New York, and with facilities at various other locations in New York,

including the six Brooklyn facilities involved in the instant case. It is engaged in providing residential social services to children and adults with developmental disabilities and mental retardation. During the past year, the Employer has derived gross revenues in excess of $250,000, and has purchased and received at its New York facilities, goods and materials valued in excess of $5,000 directly from points outside the State of New York.

The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner, a labor organization, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties stipulated, and I hereby find, that the following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time substitute direct care counselors, direct care counselors, senior direct care counselors, direct care counselor/recreation coordinators, direct care counselors/cooks, medical coordinators, cooks, housekeeping employees, maintenance employees and administrative assistants employed by the Employer at its facilities located at:
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> 594 East 53rd Street, Brooklyn, New York;
> 105-83 Flatlands 6th Street, Brooklyn, New York;
> 1321 East 94th Street, Brooklyn, New York;
> 2210 Burnett Street, Brooklyn, New York;
> 1561 East 54th Street, Brooklyn, New York;
> and 418 Grove Street, Brooklyn, New York,
>
> but excluding the chief executive officer and president, associate executive directors, registered nurses and other clinicians, the administrative assistant to the

administrative staff, Waiver Program employees, shift supervisors and other supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 215, District Council 1707, American Federation of State, County and Municipal Employees, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the

election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **July 22, 2004.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by

facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **July 29, 2004.** The request may **not** be filed by facsimile.

Dated: July 15, 2004.

/S/ ALVIN BLYER

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Alvin Blyer
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